Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

CHRISTOPHER L. FALCONE,

Petitioner,

v.

UNIVERSITY OF MINNESOTA
and THE BOARD OF REGENTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 requires an educational institution to provide reasonable accommodations to a student when those accommodations have been shown to make the student "otherwise qualified."

2. Whether the Court of Appeals properly deferred to an educational institution's decision regarding whether a student was "otherwise qualified" when the institution failed to provide reasonable accommodations.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, dated November 15, 2004, is published at 388 F.3d 656 (8th Cir. 2004). (P. App. at 1a).[1] The unpublished opinion and order of the district court, dated September 3, 2003, is reproduced at P. App. 10a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on November 15, 2004, and its order denying rehearing on December 20, 2004. (P. App. at 1a, 31a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 are reproduced at P. App. at 32a.

STATEMENT OF THE CASE

Facts

Christopher Falcone has suffered from Crouzon's syndrome, a condition which results in craniofacial disfigurement and a significant hearing loss, since the time of his birth. (App. 13).[2] Due to his condition, Falcone was diagnosed with a significant hearing loss and a number of learning disabilities at the age of five (5) years, including Attention Deficit Disorder. (App. 13). His disabilities affect his

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1. "P. App." refers to the appendix attached hereto.

2. "App." refers to the Joint Appendix filed with Appellant's Brief dated November 24, 2003.

ability to learn, memorize, read, concentrate and process auditory information. (App. 13-14, 130-131). Throughout Falcone's academic career, he has received accommodations to address his learning disabilities and his hearing loss. (App. 13-14).

Falcone began classes at the University of Minnesota Medical School ("University") in September 1995. (App. 14). The first two years of the medical school program are considered "didactic" years in which the students focus on classroom learning and have minimal contact with patients. (App. 361-363). The third and fourth years of medical school involve a clinical based approach, and students complete 52 weeks of clinical courses at various hospitals and clinics around the state. (App. 361-363). On September 15, 1995, Falcone registered with the University's Disability Services Office, informing the University that he suffered from a learning disability. (App. 182). When Falcone began taking classroom courses in September 1995, he was allowed extra test time, flexible deadlines, and tutoring.

In the 1995-96 academic year, Falcone successfully completed the requisite number of Year One courses, but failed Human Genetics and was therefore required to appear before the University's Committee on Student Scholastic Standing (COSSS), his only appearance before the COSSS during the didactic portion of the curriculum. As a result, Falcone continued on a part-time status with the agreement of the committee. (App. 185-191). Falcone discussed his disability with COSSS and the parties agreed that Falcone would work with the Disability Services office so that Falcone would receive the necessary accommodations. (App. 193-194). Falcone completed the didactic portion of the program and began taking clinical courses in the summer of 1998.

As he began the clinical courses, Falcone approached Dr. Helen Horwitz, Associate Dean, regarding his disabilities

and possible need for accommodations; however, Dr. Horwitz did not respond positively and Falcone dropped the issue. Falcone successfully completed a number of clinical rotations prior to Pediatric Neurology (App. 15-16, 32-33). Falcone failed the Pediatric Neurology clinical rotation in the winter quarter of 1999. This failure required him to appear before the COSSS in February 1999. Falcone informed the COSSS that he was a disabled student, but that he was not sure about what accommodations he should ask for during the rotation. (App. 36). On February 22, 1999, the COSSS decided to consider documentation about Falcone's disability, postponed the decision about dismissing Falcone and to work with the University's Disability Services office to arrange for the provision of accommodations. (App. 36).

Barbara Blacklock from the University's Disability Services office drafted a letter to be sent to all of Falcone's clinical course directors in order to ensure he was receiving accommodations. Most importantly, the letter included the admission that "access to at least weekly, regularly scheduled feedback meetings" was a reasonable accommodation to be provided for Falcone during clinical rotations. (App. 38-39). On March 22, 1999, the COSSS informed Falcone that it had reviewed the accommodations letter and stated that, "the recommended accommodations should provide you with the opportunity to demonstrate your knowledge and skills in a clinical setting without compromising the essential elements of the rotation" and agreed to allow Falcone to retake Pediatric Neurology. (App. 40-41). The letter defining the accommodations was sent to Falcone's clinical rotation instructors. At least two of the instructors did not receive the letter, and another told Falcone that it made him look incompetent. (App. 17-18, 21-22, 55).

Falcone was not provided the recommended accommodations in many of his clinical rotations throughout

the summer of 1999. (App. 19-21). In October 1999, Falcone failed the Clinical Medicine IV rotation and appeared before COSSS in December. (App. 49-75). During the hearing, the course director, James Pacala, M.D., admitted that he had not received Falcone's disability accommodations letter and had not provided the letter to Falcone's preceptors until the last week of the rotation. (App. 55). On December 29, 1999, the COSSS informed Falcone he would be allowed to remain in medical school and retake the Clinical Medicine IV course because he was not provided reasonable accommodations. (App. 77-79). On or about December 27, 1999, Falcone began an Emergency Medicine rotation. Falcone did not receive requested accommodation, including the regularly scheduled feedback sessions with either of the course instructors. (App. 25). Falcone received the same amount of feedback as all other students in the rotation. (App. 25-26). Falcone failed Emergency Medicine and was required to attend a COSSS hearing to consider his dismissal from medical school. (App. 28). Falcone was allowed to continue taking clinical courses pending the COSSS final decision.

In January 2000, Falcone started a clinical rotation in Neurosurgery. Although Falcone approached the course director regarding his accommodations, he was not provided any accommodations during the four week session. (App. 28-29). In March 2000, Falcone began his second enrollment in Clinical Medicine IV. (App. 29). Before this rotation began, Falcone met with various University personnel to discuss the specifics of necessary accommodations. (App. 29). It was agreed that Falcone was entitled to a meeting with his preceptors at the beginning of the rotations in order to discuss the accommodations letter and to clarify how the accommodations will be provided. (App. 29-30, 151). It was also agreed that a standard end-of-rotation evaluation form would be used during the associated weekly scheduled conferences. (App. 29-30, 151).

The letter specified that the feedback Falcone was to receive was to be more specific and required the course director to use an evaluation form during the feedback session. (App. 151). Falcone received extensive feedback during this rotation and was doing very well. His instructor commented that "his ability to process information and gather medical data has improved tremendously over the few weeks we have been together." (App. 164-165).

While Falcone was continuing with Clinical Medicine IV, the COSSS decided to dismiss Falcone from medical school. In an April 3, 2000, letter notifying Falcone of the decision, the Chair of the COSSS wrote:

> The Committee based its decision to dismiss you primarily on two factors: (1) the Committee felt that you had received appropriate accommodations on the Emergency Medicine rotation as requested by Disability Services; and (2) you have been unable to demonstrate, with or without accommodations, that you can synthesize data obtained in a clinical setting to perform clinical reasoning, which is an essential element of functioning as a medical student and ultimately as a physician.

(App. 119). Falcone appealed his dismissal and his appeal was eventually denied by the COSSS. (App. 325-327).[3]

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3. Petitioner has created a summary of Falcone's final sequence of fourth year medical school courses from various joint appendix exhibits as referenced in the chart, to serve as a guide for the Court in reviewing Respondent's failure to provide required reasonable accommodations. *See* P. App. 36a.

Proceedings Below

Appellant was dismissed from medical school on April 3, 2000. Appellant commenced a lawsuit against the University alleging discrimination and retaliation on the basis of a disability under Section 504 of the Rehabilitation Act.

On July 22, 2003, the University brought a motion for summary judgment on Falcone's claims under the Rehabilitation Act. (App. 11-12). On September 3, 2003, District Court Judge John Tunheim granted the University's motion for summary judgment. The district court found that Falcone was not an "otherwise qualified" individual for purposes of the Rehabilitation Act, that he would not have been able to successfully complete the medical school's requirement even with accommodations, and no rational fact-finder could find that Falcone was dismissed solely based on his disability. (App. 559-577). Falcone appealed the district court's order granting the University's summary judgment and dismissing the complaint.

On November 15, 2004, a panel of the Eighth Circuit Court of Appeals affirmed the district court's decision in its entirety. On November 24, 2004, Petitioner filed a Petition for Rehearing En Banc. That Petition was denied, without discussion, on December 20, 2004. This Petition followed.

Summary of Argument

This petition seeks review of a decision of the United States Court of Appeals for the Eighth Circuit upholding a decision of the United States District Court for the District of Minnesota with respect to the requirement of academic accommodation for those individuals covered under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The task of reviewing the decisions of those institutions which have denied admission to disabled persons is of great importance. The Eighth Circuit

ignored this important review and failed to consider the heavy burden the Respondent was required to carry under *Wynne v. Tufts University School of Medicine*, 932 F.2d 19 (1st Cir. 1991). The Eighth Circuit also failed to recognize other Circuits attempts to restrict this unfettered deference. *See Wong* and *Wynne.*

Petitioner believes that the decision of the Eighth Circuit Court of Appeals is inconsistent with decisions of other Circuits regarding deference to academic decisions when determining whether an individual is "otherwise qualified" for medical school with or without accommodation. As a result of ignoring precedent from other jurisdictions, the Eighth Circuit Court of Appeals is seeking to give academic institutions unfettered discretion to determine when an individual is "otherwise qualified" with or without accommodations. The Eighth Circuit Court of Appeals has in effect nullified the need to provide accommodations to individuals with disabilities because the academic institution unilaterally determines that although the accommodations make the student "otherwise qualified", the institution does not have to consistently or fully provide the accommodation if it determines the student will not be qualified "overall."

In its *Wynne* decision, the First Circuit set a heavy burden in academic accommodation cases. Under such review, the university must demonstrate that it has exhausted all possible means of accommodating a disabled student before denying or revoking the admission of such a student. Under *Wynne*, if a university rejects a proposed "reasonable accommodation," it must be prepared to articulate the grounds for the rejection in substantial detail. This Petition argues that this heavy burden cannot be met by simply stating, in its academic expertise, the university does not believe the reasonable accommodation would make any difference, despite evidence to the contrary.

Once the reasonable accommodation has been shown to make the student "otherwise qualified" the academic institution should not be allowed to ignore those reasonable accommodations and hide behind the liberal academic deference usually allowed by the courts. Although courts may be ill-equipped to evaluate academic performance, they are the best equipped forum in which to determine a university is ignoring statutory mandates.

According to authoritative decisions in the First and Ninth Circuits, this unfettered discretion was not supported by the evidence of record. The University failed to submit a factual record indicating that it conscientiously carried out its statutory obligation to seek suitable means of reasonably accommodating a handicapped person; that it followed through with those accommodations and based its dismissal decision on a review of Falcone's entire academic record, including his performance when finally provided the reasonable accommodations. Failure to carry its academic burden should result in a denial of deference to the academic opinion as to whether the student is "otherwise qualified."

REASONS FOR GRANTING THE PETITION

(a) The Panel's Decision Conflicts With Authoritative Decisions In Other Circuits Regarding Deferral To A University's Decision Regarding Failure To Meet Academic Standards.

The Eighth Circuit Court of Appeals panel decision extended virtually unrestricted discretion to the University to evaluate academic performance. (8th Cir. Panel Opinion at p. 5). As set forth in *Wong* and *Wynne*, the University was not entitled to such unfettered discretion in light of its failure to accommodate Falcone and consider the past and potential effects of such accommodations on Falcone's performance.

In *Wong v. The Regent of the University of California*, the Ninth Circuit extensively analyzed the extent of deference allowed to academic institutions when evaluating disability discrimination and Section 504 Rehabilitation claims. In *Wong*, a medical student failed several clinical courses and was eventually diagnosed with a learning disability. *See Wong*, 192 F.3d at 813. A disability counselor recommended several accommodations to help Wong succeed in his clinical courses, most of the accommodations involved giving Wong extra time to synthesize and absorb data. *See id.* The counselor specifically recommended that Wong be given extra time to read before his next two clerkships. *See id.* The University provided Wong with eight weeks off before his next two clerkships to allow him extra time to read the course material and prepare for the clinical course. After being allowed this accommodation, Wong passed the two clinical rotations receiving positive remarks from his instructors. Wong contacted the Dean's office to request another eight weeks off to read for his next clerkship; however, this request was denied. *See id.* at 814.

Wong received a "Y" grade in his next clinical course. His final grade sheet reported that his "clinical judgment was poor" and that his evaluators "had concerns with his ability to synthesize information." *See id.* at 815. Some evaluators wondered whether Wong "could safely practice clinical medicine." *See id.* Wong's failing grade in Pediatrics triggered another appearance before the SEC and Promotions Board. The SEC recommended and eventually dismissed Wong from medical school. *See id.*

In *Wynne*, the situation involved a medical students learning disabilities which included difficulty taking multiple-choice examinations. The University decided there was no reasonable way to accommodate Wynne's disability and dismissed him from the program. *See Wynne*, 932 F.2d at 19-22.

Both the Ninth and First Circuit Courts extensively reviewed the degree of deference with which the Court should treat an educational institution's decision involving its academic standards and curriculum. *See id.* Both Courts concluded that an educational institution's academic decisions are entitled to deference; however, that deference is not absolute. *See id.* at 21; *Wong*, 192 F.3d at 817. Those circuit courts held that courts still hold the final responsibility for enforcing the ADA and Rehabilitation Act including determining whether an individual is qualified, with or without accommodations, for the program in question. *See id.* The *Wong* court held that it must "ensure that educational institutions are not disguising truly discriminatory requirements as academic decisions; to this end, the educational institution has a real obligation . . . to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation." *Id.* (internal quotations omitted). The court determined that it would defer to the institution's academic decisions only after it determined that the school fulfilled its obligation. *See id.* (citing *Zuckle v. Regents of the Univ. of California*, 166 F.3d 1041 (9th Cir. 1999)); *see also Wynne v. Tufts University School of Medicine*, 932 F.2d 19 (1st Cir. 1991).

As in *Wong*, the panel should not have deferred to the University's determination that Falcone was not qualified for medical school where there remain issues of fact as to whether the University considered the past and potential effects of the reasonable accommodations on Falcone's performance. *See Wong* at 823. The University presented no evidence that the COSSS considered the fact that in his second enrollment in Clinical Medicine IV, after more specific perimeters regarding the feedback accommodation were identified, Falcone did very well in the clinical course. The University failed to compare Falcone's success in the Clinical Medicine IV course with his

poor performance in the clinical courses in which he did not receive accommodations. According to *Wong*, this failure shows that Respondent's system for evaluating a learning disabled student's abilities and its own duty to make its program accessible to such individuals falls short of the standards required to grant deference to the academic institutions decision-making process. *Wong* at 823.

The Eighth Circuit Court of Appeals panel found that Falcone failed to present evidence showing that more feedback or better delivery of any other agreed accommodation would have cured this deficiency. This finding is not supported by the evidence. In fact, the evidence establishes that specific, structured feedback on a regular basis did cure Falcone's ability to "synthesize data obtained in a clinical setting to perform clinical reasoning." (App. 29, 164-165). The University has not nor can it present evidence that the accommodations Falcone required to succeed were unduly burdensome or in anyway substantially altered its academic program. The evidence showed the University's only excuse is professors did not want to take the time to provide the reasonable accommodations. Failure to provide accommodations because of sheer reluctance to do so does not satisfy the burden set forth under *Wynne*.

Falcone produced enough evidence that he could meet the University's eligibility requirements to shift the burden of production to the University: his evaluation in Clinical Medicine IV, for which he received the accommodations the University agreed were reasonable and necessary, showed that he received satisfactory grades and generally positive comments from his instructor. (App. 164-165). Although the University argued that a review of Falcone's entire record demonstrates he did not have the ability to become an effective physician, the University failed to mention the reasonable accommodations were not correctly or consistently provided prior to his retake of Clinical Medicine IV rotation.

A comparison of Falcone's performance and evaluations in prior clinical courses, where he did not receive the necessary accommodations, to his evaluation in the Clinical Medicine IV rotation, where he did receive extensive and specific feedback on a regular schedule as outlined in the accommodation letter, shows a marked improvement in his performance. Significantly, Falcone's Clinical Medicine IV instructor wrote the following on his evaluation:

> The 1st week was extremely difficult for Chris to organize his chief complaint. He has tremendous medical knowledge. After the 2nd, 3rd week he improved 125% during the next 2 weeks with little direction from myself. He goes above/beyond his requirements as a student . . . His ability to process info (sic) and gather medical data has improved tremendously over the few weeks we have been together. He does need to work a bit faster but I believe this will come with time.

(App. 164-165). The University failed to consider this marked improvement in Falcone's performance when determining he would be unable to synthesize data in a clinical setting and approved his dismissal. Based on this failure, the panel should not have deferred to the University's academic determination that Falcone was not "otherwise qualified" to remain in medical school. The evidence establishes: Falcone failed when he did not have regularly, scheduled and structured weekly conferences in his clinical courses but with this accommodation he succeeded in all areas of the clerkship. (App. 29, 164-165). Despite this evidence, the Appellate Court bestowed unfettered academic discretion upon the Respondent, in effect allowing it to escape the mandates and purpose behind the Rehabilitation Act.

Both the First and Ninth Circuits made it clear that a University's failure to consider possible alternatives and failure

to provide a factual record indicating that it conscientiously carried out its statutory obligation to seek suitable means of reasonably accommodating a handicapped person means the court should not defer to the academic decision regarding qualification for the program. *See Wong* at 823; *Wynne* at 28. The University did not deny nor did the panel find that Falcone was accommodated in every clinical course. In fact, the evidence established that he was not accommodated in every rotation. (App. 17-18, 19-22, 55). The evidence also established that contrary to the panel's finding, Falcone did show that there were other accommodations that a reasonable fact-finder could determine would have cured the University's opinion that Falcone could not "synthesize data obtained in a clinical setting to perform clinical reasoning." Those accommodations were finally provided to Falcone in his Clinical Medicine IV clerkship. (App. 29). Despite this evidence, the University dismissed Falcone without considering his marked improvement once accommodations were provided. The evidence shows that Falcone did not receive the necessary accommodations in many of his clinical courses and therefore did not do well and in fact failed some of those courses. The evidence also shows that when he was actually provided the reasonable accommodation of regular, structured feedback on a frequent basis he made marked improvements and performed satisfactorily in all areas of the clerkship. There must be limitations on a university's ability to escape its Rehabilitation burden. The Eighth Circuit's grant of unfettered discretion in contradiction of both *Wynne* and *Wong* supports granting the Petition for Certiorari.

(b) The University's Admission Regarding Failure To Provide Reasonable Accommodations Should Have Foreclosed Allowance Of Discretion In Determining Petitioner's Qualifications.

The University did not determine that the accommodations Falcone needed were not feasible or unreasonable. In fact, in a letter to Falcone the University stated that "the recommended accommodations should provide you with the opportunity to demonstrate your knowledge and skills in a clinical setting without compromising the essential elements of the rotation." (App. 40-41). Contrary to this statement, the University later determined these same accommodations would not be effective in helping Falcone demonstrate that he could synthesize data obtained in a clinical setting. (App. 119). Most importantly, this determination was made with full knowledge that Falcone had not received the reasonable accommodations in many of his clinical courses. The University decided that the reasonable accommodations they had already agreed to provide were no longer effective in helping Falcone complete his clinical course requirements. They made this decision with no mention of any consideration of possible alternatives, nor reference to any discussion of Falcone's successful Clinical Medicine IV clerkship where reasonable accommodations were finally provided. It seems the University simply "embraced what was most convenient for faculty and administration." *Wynne*, 932 F.2d at 28.

Appellate Courts must be prohibited from shirking their duty of enforcing strict compliance with statutory mandates, especially when those mandates concern those who have been treated less favorably due to their disability. The very purpose of the Rehabilitation Act was to protect and provide opportunity for disabled Americans. This purpose cannot be met by allowing a University to provide the accommodations it has time or wants

to provide with no real intention of helping the student succeed. Case law interpreting an educational institutions duties under the Act has consistently found that the institution must accommodate on a case by case basis. The accommodations will vary from "institution to institution and within given institutions from semester to semester." *Higher Education Accommodations for Disabled Students*, 147 WELR 391 (West's Educ. Law Reporter 2000). Just as an institution cannot create separate classes or programs for disabled individuals and then force them to participate in those separate programs rather than be members of the mainstream, institutions should not be judged to have complied with Rehabilitation Act mandates when they design unworkable and unsuccessful accommodations and then fail the student who cannot succeed under such conditions.

When Respondent finally created accommodations that fully addressed Petitioner's disabilities, it chose not to provide them in a consistent or competent manner. Respondent's actions clearly evince a discriminatory animus that followed Petitioner throughout medical school and caused his legitimate needs to be viewed as burdensome and weak. Respondent failed to cure the defects in the accommodations even after determining those very accommodations were reasonable. Such blatant disregard for its accommodation duties must be cured.

(c) The Panel's Decision Conflicts With The Authoritative Decisions In Other Circuits Because It Failed To Weigh The Circumstances In Total Regarding The Universities Treatment Of Falcone Whereby In Bad Faith The University Disguised Its Discriminatory Requirements.

Petitioner's case is a more compelling example than *Wong* in regards to the 9th circuits mandate to disallow federally funded academic programs from disguising discriminatory requirements as academic decisions. Here we have a true attempt to disguise discriminatory requirements throughout Petitioner's tenure as

a medical student. The discrimination is highlighted by remarks of the Judges and the opinion of the Eighth Circuit.

Petitioner urges this Court to take the position that expecting a student to pass a course without accommodation is a discriminatory requirement. If a student is dismissed from an academic program primarily because of his performance in a given course in which he has not been accommodated, one must analyze the institutions actions for pretext. Additionally, an institutions attempts to mischaracterize a student's qualification when accommodations are actually provided should be viewed as discriminatory retaliation. In particular these mischaracterizations must not include false statements regarding the extent of or type of accommodations provided, or the preferred method of communication regarding the procurement of accommodations. Any such practice that ultimately disguises discriminatory academic requirements as an attempt to reasonably accommodate should serve as a basis for the forfeiture of the academic deference rule as set forth in *Wong*.

The following issues provide a factual and sufficient demonstration that discriminatory requirements are concealed within Respondent's actions regarding its alleged provision of reasonable accommodations.

First: The university cannot claim that the didactic failures of the 1995-1996 academic year were not about Falcone's disability. In a hand written letter to the COSSS in the Fall of 1995, Falcone notes that he was struggling with a physical disability, "I believe that the university has unfairly considered my *physical* and academic handicap to be inconsequential." (App 186, line 23). The COSSS even acknowledges that disability at the COSSS hearing regarding the Genetics failure in the summer of 1996 at the end of his first academic year. (App. 193, paragraph 3). The University's actions that followed

suggest that they were skeptical of Falcone's recovery back to his "normal" disabled state and had Susan Ritacca, University Disability Services specialist, discourage him from proving otherwise (App. 195). The University touted the accommodations that it allegedly provided in Petitioner's first academic year. (App. 197). Falcone shocked the University by not failing any of his courses in the following, 1996-1997, academic year despite the failure to provide accommodations in the Clinical Medicine portion of the curriculum. To say one year that Falcone was in error because he decelerated his course schedule and in the following year he was in error because he did not decelerate is a basis for pretext.

Second: The University had an informal policy regarding accommodations that was not recognized by the Eighth Circuit. In his first academic year, Falcone presented the committee with information regarding his transient physical disability. (App 186, line 23). The COSSS acknowledged Falcone's physical disability by proxy when they allowed him to decelerate to part-time status. This suggests that Falcone had a number of conversations with agents from the University prior to the delivery of his letter to disability services. In fact, the COSSS Chair, Dr. Mauer, notes "nothing's documented, nothing's written down, but there have been a number of meetings between Falcone, Dr. Helen Horwitz and myself .. ."[4] (App. 239) In the spirit of these informal negotiations Falcone's Affidavit states:

> In May of 1998, I had talked to Dr. Helene Horwitz about my upcoming transition to a full time clinical curriculum, and told her that I felt that I would need a letter informing instructors on the clinical rotations

4. Falcone disputes Mauer's recollection of the timing of these "informal" meetings. Mauer then cites the committee meetings as being inclusive [logically he then is implying that they also were informal]. (App. 240).

> that I needed some extra time and that I was a disabled student. Dr. Horwitz shook her head and said. "no, I don't know" and the subject was dropped.

(App. 15).

Since Associate Dean Helene Horwitz and Falcone knew of each other as she puts it "very well", she should have done what she could to help as there was no doubt in her mind as to whether Falcone was disabled. (App. 278). If the University conceals this relationship from the courts in essence they are seeking ultimately to disguise discriminatory requirements because what they expect of the student and what they tell the courts the student must do regarding the procurement of accommodations are significantly divergent. (App. 571).[5] The potency of Falcone's exchange with Horwitz regarding clinical accommodation can be better understood after considering the following section.

Third: In Years 1 and 2, there is evidence to suggest that Falcone was not informed that his advisor chose not to provide accommodations for him in the didactic portion of the Clinical Medicine curriculum. In a ***private*** communication from Dr. Ken Roberts to Dr. Horwitz, Dr. Roberts discusses the course directors he had contacted. (App. 196). He informs Dr. Horwitz that he only informed course directors in major courses and lists the courses and the course directors by Name.[6] Dr Ytteberg the clinical course director of the didactic portion of the Clinical Medicine Program, Clinical Medicine I, II, and III, was not listed

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5. Judge Tunheim's Memorandum Opinion does not acknowledge this sense of informality and concludes however that at that juncture that Horwitz need not do all that she could.

6. Roberts lists course directors: Dennis Livingston, Richard Link, and Ron Shew as being the Major Course Directors that he had spoken to. (App. 196).

in that communication. Perhaps this explains Dr. Azar's personal account of her callousness toward Falcone in front of his classmates when she discussed his difficulties with the course: "Furthermore, I scheduled for him another simulated patient for the 10-8-97 session. He refused to do it, even at the urging of the other students who told him that these people get paid for their service." (App. 201). One could argue that the flexible exam scheduling requested in the accommodations letter was afforded to Falcone when Dr. Ytteberg allowed Falcone to prove himself by seeing additional patients, but since Dr. Ytteberg never received any accommodation letter one has to wonder just exactly how all of that was brought about unless this "accommodation" was something the University would have done for any other student. Nowhere in Dr. Ytteberg's communications to Dr. Horwitz does he say anything about accommodating Falcone, his disability, nor that he ever received an accommodation letter (App. 198,199)

Nowhere in any of Susan Riticca's letters (App. 184, 195, 197), nor in any of the COSSS letters regarding accommodations pertaining to Years 1 and 2, (App. 189, 191, 194), does it say that accommodations were not to be provided in Clinical Medicine I, II, and III. However, the evidence suggests that not only was Falcone not accommodated in that part of the curriculum but also that he was ***not*** aware of the failure to accommodate. (App. 196). There is nothing in the record to suggest that anyone bothered to contact Dr. Yetterberg regarding any of the agreed upon accommodations.[7]

Judge Tunheim noted that Falcone did not know what to ask for regarding accommodations when transitioning to the clinical curriculum (Jt. App. 571; Cert App. 14a). Taking into

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7. Falcone is documented to have refused to meet with Roberts. Later he decides to send specific requests through Sara Axtel (App 202, 203, 206).

account that the record suggests that not only was Falcone not accommodated in Years 1 and 2 in the Clinical Medicine curriculum, that is Clinical Medicine I, II and III, but also he was not even aware that Dr. Yetterberg was not contacted by Dr. Roberts regarding his decision to de-emphasize clinical accommodation. It makes perfect sense that Falcone would be baffled and not know what to ask for regarding future clinical accommodations since nobody in the Clinical Portion of the didactic curriculum ever seemed to say anything about Susan Ritacca's letters. (App. 184, 195, 197). Clearly flexible scheduling of patient examinations would have been a great plus for Falcone in Dr. Azar's Clinical Medicine II tutorial. Clearly he would have benefitted from having Dr. Ken Roberts fulfill his responsibility and contact Dr. Yetterberg regarding accommodations. The evidence suggests that discriminatory requirements have been concealed by Ken Roberts. It follows that the neglect of agents Ken Roberts and Helene Horwitz contributed to Falcone's initial shyness and befuddlement regarding clinical accommodations[8].

Fourth: In Pathophysiology IV Falcone did opt for an automatic retake for the Infectious Disease segment since it was the least weighted of the segments. Dr. Mauer allowed Falcone to retake the exam but he did not pass the retake. Falcone complained to the Course Director and it was agreed that he could write a paper in lieu of re-taking the entire course. Dr. Soltis did not accept the course director's decision regarding this accommodation and deferred the decision to the newly appointed Year 2 course director, Douglas Wangensteen. Falcone

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8. Ultimately the University failed to teach Falcone what he needed to know about the behind-the-scenes accommodations process. Not benefiting from clinical accommodations early on hindered Falcone from effectively procuring accommodations later during Years 3 and 4.

did consult with Douglas Wangensteen and asked him to defer to the wishes of the Course Director (App. 448-454)[9].

Judge Tunheim erringly states "Despite the failure to provide feedback, the Court finds no evidence that the University acted in "bad faith." The University provided Falcone with extensive accommodations, even allowing him to repeat several classes (which is against medical school policy). " (App. 573) While it is true that the Course Director gave Falcone accommodations that allowed him to avoid retaking Infectious Disease, this was clearly not forbidden as the COSSS rules allow for a student with a Year 1 failure to proceed to Years 3 and 4 Clinical training without successful completion of the course as long as the student obtains COSSS approval. (App. 522).

Fifth: As stated above in '**Second"**, the record suggests that Respondent expected accommodations to be requested informally. Further support of this proposition is instanced by the actions of Falcone's Year 3 & 4 Clinical advisor, Dr. Charles Truit, MD., professor of Neuroradiology. Dr. Truit remarked in a January 6, 1999, letter to Dr. Horwitz as a response to a call from Dr. Lawrence Lockman of Pediatric Neurology, that Falcone should concentrate on "issue[s] of perception rather than pursuing [things] at the Dean's office level." (App. 376). Falcone took Dr. Truit's advice and forwent meeting with the dean, didn't request accommodations, and went on to fail Pediatric Neurology. The sequence of events regarding Dr. Truit's actions forthwith, are chronicled by the COSSS letters that followed regarding Pediatric Neurology. The February 22, 1999 COSSS letter does not mention Dr. Truit whatsoever (App.

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9. Falcone was encouraged by the COSSS in the summer of 1996 to have Douglass Wangensteen arrange his accommodations. Falcone made it clear to the COSSS that such a relationship was inappropriate as both he and Douglass Wangensteen were both blood relatives of the late Dr. Owen Wangensteen.

217, 218). Subsequent to that meeting Falcone violated the informal policy of informality by initiating the Blacklock accommodation letter under the supervision of Dr. Terry Rossborough, MD. (App. 219, 220). In the very next COSSS letter it is noted that Falcone must find a new advisor (App. 223). Falcone, of course wanted a qualified advisor.

Nine months later at the December 15, 1999, Falcone was confronted by Helene Horwitz who alleged both that many attempts had been made to find an advisor and that nevertheless Falcone chose not to respond. (App. 240). The December 15, 1999 COSSS transcript explains that Dr. Mauer, Horwitz, and Falcone had numerous undocumented interactions regarding Petitioner's advisor request. Despite these conversations, Respondent went on to allege that Falcone made no informal request to obtain a qualified replacement advocate. (App. 239, 240)[10].

Sixth: In regards to accommodations, and similar to the lack of accommodations in Clinical Medicine I, II, and III, the process of accommodation delivery in Clinical Medicine IV was also in lockstep. In Clinical Medicine I, II, and III, there is no evidence that the course director was ever contacted by Ken Roberts as has been stated above, nor was there ever any assertion in that regard. In contrast, in Clinical Medicine IV, a*llegedly* Dr. Pacala did not become aware of Falcone's

10. Following the December 1999 COSSS meeting an "advisor group" was assembled to allegedly help Falcone and consisted of Marylyn Backer, Dr. Thomas Mackenzie, MD, Psychiatry., Dr. Levi Downs MD Ob/Gyn, and Dr. Theodore Thompson MD. Dr. Thompson never contacted Kilgore until the last week of Emergency Medicine, Falcone had already passed Ob/Gyn., Becker was not a physician, and Falcone asked Dr. Mackenzie to attend Falcone's his April 26, COSSS Appeal a he would be "otherwise be without council." The April 27 COSSS letter confirms that Mackenzie did not show on Falcone's behalf. (App. 266, 360, 325).

accommodations letter until the last five days of the eight week rotation that began on June 7, 1999 and therefore could not dispatch specific instructions regarding accommodations. However, Judge Tunheim claims that Dr. Pacala, course director of Clinical Medicine IV, had an awareness that became manifest only several weeks in to the rotation which is demonstrably incorrect [11] (App. 566). Rather than to admit that Falcone was being forced to meet discriminatory requirements, in a forthright gesture Barb Blacklock and Dr. Pacala rally to remedy the problem and continue to allege that they were unaware of the problem until the last week of the rotation. Based on the fact that this was just a continuation of a trend that began during Clinical Medicine I, II, and III during the didactic years, so there is reason to believe Respondent's actions were disingenuous. At the December 15, 1999 COSSS meeting to address the Clinical Medicine IV failure, the COSSS stated that Falcone was allowed to retake the course because he was not accommodated. (App. 78 last paragraph).

Seventh: In total, the clinical accommodations letter was subject to three COSSS reviews. The first review was after its conception by Blacklock and Dr. Rossborough on March 22, 1999. (App. 223). The second review occurred at the COSSS meeting on December 15, 1999 when Blacklock testified that the accommodations letter was misunderstood. (App. 73). A final review occurred during the COSSS meeting of March 15, 2000--the meeting that kicked off the interim period pending Falcone's appeal. One day after this second-to-last COSSS hearing of March 15, 2000, the accommodation letter was finally

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11. Judge Tunheim states that the course director had not received requests for accommodations until several weeks into the rotation (App. 566). Fact is that according to the dates during the summer of 1999, the rotation began June 7, but it was 7 weeks later on July 27 that Dr. Pacala even began to contact Falcone's preceptors (App. 56), as the 8 week rotation ended on July 30, 1999 (App. 34).

modified by Blacklock to address concerns that had first been voiced over three months earlier during the December 15, 1999 COSSS meeting. Petitioner suffered two additional alleged course failures while Respondent attempted to get the accommodations right.[12] The revised letter was three months too late to be used in Emergency Medicine and about 24 days too late to be used during the Nephrology/Renal Consult rotation. (App. 151-152). The two major changes in the letter have been proven to have had a positive impact on Falcone's performance on the one rotation it was applied to, Clinical Medicine IV. (App. 164, 165). Most importantly, Petitioner finally received weekly conferences.

Dr. Thompson, Ex Officio COSSS member and Dean of Year 3 & 4, however did not act as Dr. Pacala did, nor as suggested by Dr. Mauer, Chair of the COSSS, nor as understood by Falcone (App. 60, last Falcone citation). Dr. Mauer declares at the December 15, COSSS meeting that they would "try to alert--and obviously with more muscle to it--your teachers, that these particular accommodations need to be addressed" (App. 245, 7th line from the bottom) Yet in the March 15, 2000 COSSS meeting Dr. Thompson alleges that he "checked on the of evaluation and feedback that does happen in that particular course," (App. 287). Kilgore dates this contact during the last week of the rotation on Monday, January 17, 2000. (App. 291). Kilgore states in his deposition that he was not contacted by Dr. Thompson prior to the rotation but rather by some unknown woman that faxed the accommodation letter (App. 391). What's striking about this is that again no one explained that Falcone wanted the weekly feedback conferences to Dr. Kilgore, not even COSSS Ex Officio agent Dr. Thompson who's

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12. This is actually eight months after Barbara Blacklock and Dr. Pacala allegedly first discovered there was a problem with expediting the accommodations.

responsibility it was to make such arrangements. Dr. Thompson alleges that he was surprised to find such an excellent feedback system in place on the rotation. The record clearly shows that the person who had the primary burden of arranging Falcone's weekly feedback conferences did no such thing.

In essence the Respondent made an assumption that there would be a mechanism that would automatically suffice, though imperfect, as a proxy to the weekly conferences that had been requested. In stark contrast is Dr. Ronald Cranford's letter where he, in a great expiration of alleged facts, claims that the accommodations requested were totally unheard of. (App. 167, 168) Clearly, Dr. Thompson never intended for Falcone to get the accommodations he needed but rather only automatic services provided by the rotation.

Finally, in regards to the accommodation letter revision that occurred on March 16, 2000, there was only one true material change incorporated into the letter. That was for weekly feedback sessions of a specified duration who's content was to be determined by using a standard end-of-rotation evaluation form as a template. (App. 151). Very telling is what *did not change* in the letter were the two words: "Access to . . ." which prefixed only the request for the weekly conferences[13]. Judge Tunheim catches this and states that Falcone did request more than just "access to" accommodations and hence was not accommodated in spite of the Universities assertion that he never asked for anything more than "access to" them. (App 572-573).

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13. Grammatically, the parallel form of the accommodations list was broken by those two words only in the case of the scheduled conferences, suggesting both in form and function that the weekly conference accommodation was somehow different from the other listed accommodations (App. 151, 219). Given that Falcone was only accommodated on his last rotation Petitioner asserts construction acted as a proxy to deter these accommodations.

The panel of the Eighth Circuit Court of Appeals adopts the same terminology that Dr. Mauer's foreboding proclamations of exemption regarding responsibility of the COSSS toward the provision of Falcone's accommodations. Both take the position that the COSSS is not remiss for accommodations that "may not be carried out to perfection." (App. 245, 5^{h} line from the bottom, and 8^{h} Circuit Panel's Opinion page 6-7). The Eighth Circuit erringly implies in contradistinction to Judge Tunheim's finding that Falcone was accommodated, though imperfectly, and rules however that they were sufficient in that the accommodations provided in the Emergency Medicine rotation did not differ materially from what had been requested. The evidence establishes that Falcone asked for and expected the weekly conferences, and it was clearly his perception they did differ materially from the cursory feedback given automatically on the rotation. Had Falcone not desired the sessions, more to the point, had he not thought that they would have had a material impact on his performance, then why would he risk the very likely prospect of retaliation by Dr. Kilgore (App 283). The fact is Dr. Mauer stated that he would "put more muscle" toward enforcing accommodations. Dr. Mauer's alleged and professed strong arm tactics clearly corroborate Falcone's March 15, 2000 COSSS testimony of the intensely abusive retaliation that he experienced in an arguably unauthentic weekly conference that occurred several days prior to the end of the rotation. (App. 285, second paragraph, line 6). Fact is perhaps if Dr. Kilgore was not disingenuous with his deviant, but above "average" attitude marks toward Falcone together they could have negotiated a different outcome as Mauer clearly states during the December 15, 1999 COSSS hearing that "teachers are free to reconsider." (App. 70, paragraph 4, line 6)

The Eighth Circuit panel was in complete contradiction to *Wynne* and *Wong* by asserting that it did not matter whether the

accommodations once rendered properly helped Falcone perform adequately because he was otherwise unqualified according to his entire record. On one hand the Court validated a gross pattern of error regarding the delivery of accommodations and their content. But on the other hand Falcone's record is held to a higher account as pretext is applied to his record repeatedly. Falcone has shown that with accommodations he could do well in the didactic portion of the curriculum—because the COSSS applied the rules as they did regarding his academic deficiencies advancing Falcone sequentially to each subsequent Year, the Court must apply the same standard as the COSSS originally did and deal at the very most with no more than Falcone's performance in the most current academic year when determining whether Falcone was otherwise qualified—anything else would be pretextual. (App. 519, 7^{h} line from the bottom).

Given the grave retaliation rendered by Dr. Kilgore in Emergency Medicine, Falcone had no choice but to accept the status quo. When the university offered to change his accommodation the day after he was dismissed at the March 15, 2000 meeting, Falcone despite the painful irony, met with his adversaries regarding the revised letter. Weekly conferences are reasonable and trivial to perfect. It would have been nothing for Falcone to have had 12 weekly conferences during the time that intervened between the December 15, 1999 COSSS hearing and the March 15, 2000 COSSS hearing, but the record is clear that between the three courses, Emergency Medicine, Neurosurgery, and Renal Consult (Nephrology), he only had 2 weekly conferences total and they were mid-evaluations that every student was entitled to. Out of 12 weeks, 12 possible opportunities for weekly conferences, Falcone only received 2 valid conferences, a mid-evaluation in Emergency Medicine and a mid-evaluation in Nephrology—clearly this is a huge deviation from perfection.

The consecutive weekly conferences made a difference as Falcone rotated through Dr. White's clinic. Falcone was out of the Medical school, his upcoming appeal was not going to change that, so with a wink and nod Falcone finally got his weekly conferences. As has been stated several times in this writ, Dr. White stood steadfast at the time in his conviction that marked sequential performance improvement was seen in Falcone during the course of the rotation. This emphasized that finally the purpose of the weekly conferences was being fulfilled and Falcone was able to improve. However, the Eighth Circuit ruled imperfectly delivered accommodations were good enough to allow Respondent the academic discretion to dismiss Petitioner from medical school. Petitioner urges this Court to hold that imperfect accommodations are equal to no accommodations and should not be "good enough" when assessing whether an academic institution has carried its burden under Section 504 of the Rehabilitation Act. This Court must restrict an institution's ability to half-heartedly comply with the accommodation requirements and still be protected in its unfettered discretion. The continued demise of protection for disabled Americans in an academic setting must end.

Additional Evidence: There are two final extremely distressing points that Petitioner urges this Court to consider carefully in its determination of whether to grant this writ of certiorari.

First of all, there is the untimely delay of the grade in Medicine II. This course was taken in the fall of 1999 the grade however was not rendered until Spring of 2000. (App. 33, 34, & 42). There is clear evidence that Falcone was not accommodated on this rotation (App. 21-22, 115). So far the court has ignored the delay perhaps as yet another peculiar happenstance and has chosen not to mention it in any regard. The timing of the release of the decision was pure Goldilocks

in nature—not too early nor too late. Had the announcement been sooner the dismissal hearing would have been in regards to Medicine II rather then Emergency Medicine (App 42 vs 80, w/ dissemination variance of only 6 days). Any later in the rendering and it would have looked even more suspicious as it would have shown that Respondent was attempting to fail Falcone nearly simultaneously and retroactively in three courses subsequent to his dismissal. From a legal point of view, forestalling the Medicine II failure until after the Emergency Medicine failure has been clearly advantageous to the University. Dr. Mauer's statements during the December 15, 1999 COSSS meeting, that the University is not responsible for the perfection of accommodations, is again even more foreboding of the anticipated controversy as to whether the accommodations issue in Emergency Medicine would ultimately become a genuine issue of material fact as to whether Falcone was actually accommodated.

Finally, there is the issue of Falcone's alleged failure in Nephrology/Renal Consult. It is the final question that remains to be answered surrounding this 4-week course. (App. 32-34). Obviously, one must wonder how Dr. Hostetter knew that he could "get away" with not tendering a grade. The University has provided no evidence that this is a truly legitimate faculty option. Of course Dr. Hostetter may have made this statement to Falcone so that he would not take up the issue of the lack of accommodations on the rotation. Falcone received a single mid-evaluation from Dr. Segal in a 4 week rotation which is far from the desired and requested weekly conferences that Dr. Thompson was intended to secure. Dr. Hostetter rather than Dr. Segal ultimately decided to fail Falcone. Of course this failure followed on the tail of Falcone's March 15, 2000 dismissal so it would not look good to just fail him outright. More disturbing still is a pattern that can be seen that suggests that there was actually some kind of automaticity behind Hostetter's action to ultimately fail Falcone.

Falcone's string of failures began after he confronted Dr. Steinberg about the lack of accommodations (App. 20). The pattern that has arisen always demonstrates two back-to-back performance deficits at least one of which is an alleged timely failure always accompanied by another retroactive attempt which may or may not be ruled as a failure. Evidence suggests that the University has experience with implementing actions against medical students in a rote manner. What was unusual about Falcone was that his tenacity was evoking and gave agents of the University a chance to repeat a pattern of behavior that had up till then served them well in past operations.

CONCLUSION

Therefore, Petitioner respectfully requests that this Court grant this petition for writ of certiorari, reverse the decision of the United States Court of Appeals for the Eighth Circuit, and hold that academic institutions have not met their burden of accommodation under Section 504 of the Rehabilitation Act when they fail to provide accommodations consistently and adequately in order to help the disabled student succeed.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED NOVEMBER 15, 2004

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-3469

Christopher L. Falcone,

Plaintiff - Appellant,

v.

University of Minnesota,

Defendant - Appellee.

Submitted: June 16, 2004
Filed: November 15, 2004

Before LOKEN, Chief Judge, JOHN R. GIBSON and BYE, Circuit Judges.

LOKEN, Chief Judge.

When Christopher Falcone was admitted to the University of Minnesota Medical School, he advised the University's Disability Services Office that he suffers from learning disabilities. Falcone received accommodations but was dismissed from the medical school after failing three clinical courses. He then commenced this action, claiming the dismissal violated Section 504 of the Rehabilitation Act

of 1973, 29 U.S.C. § 794(a). The district court[1] granted summary judgment in favor of the University, and Falcone appeals. Reviewing the grant of summary judgment de novo, and viewing the facts in the light most favorable to Falcone, we affirm. *See Amir v. St. Louis Univ.*, 184 F.3d 1017, 1024 (8th Cir. 1999) (standard of review).

I. Background.

The University divides its four-year medical school curriculum into two parts. After two years of courses in a classroom setting, students undertake clinical rotations during the third and fourth years. When Falcone began taking classroom courses in September 1995, he was allowed extra test time, flexible deadlines, and tutoring, accommodations similar to those afforded when he obtained undergraduate and master's degrees from Berkeley and the University of Illinois. By November 1995, he was nevertheless failing two first year courses and had missed an exam in a third course. The University's Committee on Student Scholastic Standing ("COSSS") recommended that he switch to a part-time schedule, and Falcone agreed.

In the 1995-96 academic year, Falcone successfully completed five of fourteen Year One courses, but he failed Human Genetics and was therefore required to appear before COSSS. After an August 1996 meeting, COSSS advised Falcone that he must complete the nine remaining Year One classes, including Human Genetics, during the 1996-97 academic year. Failure to do so, COSSS warned, "may result

1. The HONORABLE JOHN R. TUNHEIM, United States District Judge for the District of Minnesota.

in a hearing for dismissal." Falcone also consulted with a Disability Services Specialist and agreed to the following accommodations: double time and a private room for examinations, a microscope and slides for home use, student notes, and regular meetings with his faculty mentor. Falcone nonetheless failed Pathophysiology II in March 1998 and Pathophysiology IV in May 1998. COSSS permitted him to take make-up exams in these courses, despite a medical school policy that students below the eighty percent passing rate may not retake examinations. With this additional accommodation, Falcone completed his two years of classroom courses and began clinical rotations in the summer of 1998.

Falcone failed the Pediatric Neurology clinical rotation in the following winter quarter. The Associate Dean for Student Affairs wrote him advising that he must appear before COSSS to request permission to repeat the course. If permission was denied, the Dean explained, or if permission was granted and he again failed, or failed any other clinical course, "a hearing for dismissal will be held." Falcone appeared before COSSS in February 1999. He explained that he failed Pediatric Neurology because he was petrified by the fragile babies, intimidated by the faculty, and unprepared for the rotation. After a Disability Specialist developed a new list of accommodations for his clinical rotations,[2] COSSS allowed Falcone to repeat the pediatric

2. The accommodations included double time and a private environment for exams, flexible breaks during the day, permission to use checklists for clinical procedures and to take notes during meetings, and "access to at least weekly, regularly scheduled feedback meetings" with the instructors.

neurology rotation but warned that "if you fail another clinical rotation, you will be subject to a hearing for dismissal." A letter defining the new accommodations was sent to Falcone's clinical rotation instructors. At least two may not have received the letter, and another told Falcone it made him look incompetent.

Falcone failed the Clinical Medicine IV rotation in October 1999 and appeared before COSSS in December. COSSS allowed Falcone to remain in school and retake the course because he was not provided reasonable accommodations but expressed "substantial concerns about your overall readiness to obtain an M.D. degree." Falcone then failed Emergency Medicine in February 2000, his third failure in a clinical course. After a lengthy hearing, COSSS unanimously voted to dismiss him from the medical school. In an April 3, 2000, letter notifying Falcone of the decision, the Chair of COSSS wrote:

> The Committee based its decision to dismiss you primarily on two factors: (1) the Committee felt that you had received appropriate accommodations on the Emergency Medicine rotation as requested by Disability Services; and (2) you have been unable to demonstrate, with or without accommodations, that you can synthesize data obtained in a clinical setting to perform clinical reasoning, which is an essential element of functioning as a medical student and ultimately as a physician.

Falcone appealed this decision and again appeared before COSSS, expressing the view that he "could become a

physician scientist and have a bright future in basic research." COSSS voted unanimously not to reinstate him. The Chair's letter to Falcone explained that COSSS "continues to believe that you cannot adequately synthesize data obtained in a clinical setting to perform clinical reasoning. . . . Without these skills, the Committee believes you could compromise patient safety as a physician."

II. Discussion.

Section 504 provides, "No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability ... be denied the benefits of ... any program or activity receiving Federal financial assistance. . . ." Section 504 applies to postgraduate education programs that receive or benefit from Federal financial assistance. *See* 45 C.F.R. § 84.41. However, the statute does not require an educational institution to lower its standards for a professional degree, for example, by eliminating or substantially modifying its clinical training requirements. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979); *see* 45 C.F.R. § 84.44(a) & App. A ¶ 31.

To avoid summary judgment on his wrongful dismissal claim, Falcone must present sufficient evidence that he was disabled, otherwise qualified, and dismissed solely because of his disability. *See Jeseritz v. Potter*, 282 F.3d 542, 546 (8th Cir. 2002); *Amir*, 184 F.3d at 1029 n.5. The University concedes for purposes of summary judgment that Falcone is disabled. The issues, then, are whether Falcone presented

sufficient evidence that he was "otherwise qualified" to remain in medical school but was nonetheless dismissed solely because of his disability.

A. Taking up the easier issue first, we agree with the district court that no rational factfinder could conclude that Falcone was dismissed *solely* because of his learning disabilities. The University explained that Falcone was dismissed because "you have been unable to demonstrate, with or without accommodations, that you can synthesize data obtained in a clinical setting to perform clinical reasoning, which is an essential element of functioning as a medical student and ultimately as a physician." Falcone presented no evidence that this explanation was pretextual, or that the University's decision was a bad faith exercise of its virtually unrestricted discretion to evaluate academic performance. *See Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 95 (1978) (Powell, J., concurring) (evaluating performance in clinical courses "is no less an 'academic' judgment . . . than assigning a grade to . . . written answers on an essay question"). "We will not invade a university's province concerning academic matters in the absence of compelling evidence that the academic policy is a pretext for [disability] discrimination." *Amir*, 184 F.3d at 1029.

Falcone argues that he presented sufficient evidence of bad faith because he was not provided all the accommodations listed in the Disability Specialist's letter in every clinical rotation. However, it is uncontroverted that the University made numerous accommodations throughout Falcone's medical school career, bending its policies and

giving him additional chances when his performances raised serious concern about his ability to function as a physician. Despite these accommodations, Falcone failed three clinical courses, after he failed numerous classroom courses before finally completing that part of the curriculum. "Nothing in the record suggests that the University's decision was based on stereotypes about [Falcone's disability] as opposed to honest judgments about how [he] had performed in fact and could be expected to perform." *Anderson v. Univ. of Wis.*, 841 F.2d 737, 741 (7th Cir. 1988); *see Hines v. Rinker*, 667 F.2d 699, 703 (8th Cir. 1981) ("no genuine issue of material fact is presented ... where the record provides ample evidence of the dismissed student's scholastic ineptitude") (quotation omitted).

The University was not required to tailor a program in which Falcone could graduate with a medical degree without establishing the ability to care for patients. Based on the uncontroverted evidence of Falcone's academic deficiencies, the only reasonable inference from this record is that he was dismissed because of the University's genuine concern about his inability to synthesize clinical data.

B. In addition, we agree with the district court's alternative ground, that Falcone failed to present sufficient evidence that he was otherwise qualified to remain in the University's medical school program. It is undisputed that Falcone was not qualified to remain in medical school without accommodations. He then bears the burden "to establish that reasonable accommodations for his disability would render him qualified for the medical school program." *Stern v. Univ. of Osteopathic Med. & Health Scis.*, 220 F.3d 906, 909 (8th Cir. 2000).

Appendix A

Falcone argues that genuine issues of material fact preclude summary judgment on this issue because he did not receive one of the agreed accommodations in all his clinical courses—access to at least weekly, regularly scheduled feedback meetings with each instructor—and because his performance improved in clinical rotations when he received that level of feedback. In prior medical school cases, the issue has been whether the students requested reasonable accommodations that the universities refused to provide. *See Stern*, 220 F.3d at 908-09; *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1048-51 (9th Cir. 1999). Here, on the other hand, the parties agreed on the accommodations to be provided, but Falcone argues they were imperfectly delivered. The University's COSSS disagreed and also concluded that he was, in any event, academically unfit. The latter point is critical—even if there is a genuine fact dispute over whether the feedback accommodation was perfectly implemented, Falcone must still show that, if it had been perfectly implemented, he would have passed the clinical courses that he failed. We agree with the district court that Falcone did not meet this burden.

The University presented abundant evidence supporting its conclusion that no amount of additional feedback would have made Falcone "otherwise qualified" to remain in school and receive a medical degree. In Emergency Medicine, Falcone acknowledged that he received feedback at the end of each shift from the residents with whom he worked and never approached the course instructors for additional feedback, yet he failed that course, his third failure in a clinical rotation. In Renal Medicine, a clinical course in which Falcone praised the level of feedback provided, the instructor

did not issue a grade because Falcone's "fundamental abilities for clinical medicine were not sufficient," and he was "not able to handle the load and working pace of an intern in an internal medicine program." In addition, Falcone's Pediatric Neurology instructor had "great reservations about [his] ability to practice medicine." His Otolaryngology instructor noted his inability "to synthesize the information at hand into a practical, workable plan." And his Surgery instructor noted that all faculty and residents who worked with Falcone "expressed concern with his ineptitude to relate with patients."

Falcone did not controvert this evidence, nor did he present evidence other than his own opinion that he would have become "otherwise qualified" had he been provided more or better instructor feedback. Falcone failed an unacceptable number of clinical courses because he could not "synthesize data obtained in a clinical setting to perform clinical reasoning." He failed to present evidence showing that more feedback or better delivery of any other agreed accommodation would have cured this deficiency. Accordingly, the grant of summary judgment on this issue was proper.

The judgment of the district court is affirmed.

APPENDIX B — MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA DATED AND FILED SEPTEMBER 3, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 01-1181 (JRT/SRN)

CHRISTOPHER L. FALCONE,

Plaintiff,

v.

THE UNIVERSITY OF MINNESOTA
and THE BOARD OF REGENTS

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Christopher Falcone sued the University of Minnesota Medical School ("University" or "medical school"), pursuant to the Rehabilitation Act, 29 U.S.C. §§ 794 *et seq.*, alleging that the University failed to provide reasonable accommodations for his disability and dismissed him solely because of his disability. The University claims that the dismissal was for academic reasons, and that Falcone is not qualified to be a physician. For the reasons discussed

below, the Court finds that the University did not not violate the Rehabilitation Act ("the Act"), and grants defendants' motion for summary judgment.

BACKGROUND

I. Falcone's Background

Falcone was born with Crouzon's syndrome,[1] a condition which results in craniofacial disfigurement. He has undergone multiple surgeries to correct for the disfigurement Crouzon's causes. Those surgeries have resulted in hearing loss. Falcone also has learning disabilities including Attention Deficit Disorder.

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1. WebMD provides the following information about the disorder:

> Crouzon syndrome is a rare genetic disorder that may be evident at birth (congenital) or during infancy. The disorder is characterized by distinctive malformations of the skull and facial (craniofacial) region. Such abnormalities may vary greatly in range and severity from case to case, including among affected family members. However, in most infants with Crouzon syndrome, the fibrous joints between certain bones of the skull (cranial sutures) close prematurely (craniosynostosis). In addition, facial abnormalities typically include unusual bulging or protrusion of the eyeballs (proptosis) due to shallow eye cavities (orbits); outward deviation of one of the eyes (divergent strabismus or exotropia); widely spaced eyes (ocular hypertelorism); and a small, underdeveloped upper jaw (hypoplastic maxilla), with protrusion of the lower jaw (relative mandibular prognathism)."

Appendix B

Falcone attended the University of California at Berkeley as an undergraduate, graduating with a double major in chemistry and statistics. He then attended the University of Illinois-Champagne Urbana where he earned a masters degree in chemical physics. At both institutions, he received accommodations such as extra time to take exams and reduced course loads.

He then enrolled in the medical school at the University of Minnesota. At the beginning of his medical school career, Falcone registered with the University's Disability Services Office, and several accommodations were recommended and provided, as will be discussed more thoroughly below.

II. Medical School

A. Curriculum

The first two years of medical school are classroom years, during those years, students have only introductory exposure to patients, and little clinical experience. These years are referred to as the didactic portion of medical school.

Years three and four shift to a clinical based method of education. Students complete 52 weeks of required clinical courses during the third and fourth years.[2] Clinics are

2. These 52 weeks are divided as follows: 12 weeks of internal medicine; 6 weeks each of surgery, obstetrics-gynecology, pediatrics, and psychiatry; 4 weeks of neurology; 4 weeks in surgical specialties, and an 8-week ambulatory care experience with 4 of those weeks in family practice and 4 weeks in either general medicine, general pediatrics, or geriatrics.

performed at various hospitals and clinics in Minnesota and are supervised by on-site physicians. Clinical rotations are designed to simulate the practice of medicine. During rotations, students interview and assess patients, synthesize data, and recommend a course of treatment based upon the presentation of any particular patient.

B. Evaluation

Written and objective clinical examinations and other methods are used to evaluate the performance of all medical students. Students receive written and oral feedback, so that they may be informed of their progress, and take appropriate steps to improve if necessary. First and second year courses are graded on a pass or fail basis (P—N). Later courses are graded as H (honors), E (excellent), S (satisfactory), N (no credit, fail), I (incomplete).[3]

C. COSS

Students experiencing significant academic difficulties are asked to appear before the Committee on Student Scholastic Standing ("COSS"). Students may be dismissed from the medical school, following a hearing in front of COSS, if they have not demonstrated satisfactory academic performance or have exhibited other conduct or behavior that would prevent the individual from responsibly undertaking the duties of a physician.

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3. The grading system has been changed, but this H through I system was in effect when Falcone attended the medical school.

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Procedures for dismissal hearings are set out in the "Policies and Procedures of the Committee on Student Scholastic Standing," which notes that "[t]he hearing is intended to allow presentation of relevant facts and arguments to the Committee before a decision is reached." The Committee reviews "the student's entire overall performance in medical school and other pertinent information about that individual's qualifications to become a physician."

III. Falcone's Experience-Didactic Education

Falcone met with the University's Disability Services office during his first month of medical school. That office informed the medical school that Falcone needed accommodations including double time for tests, flexible deadlines, tutors to streamline the learning process, and assistance in accessing any tutorial programs in the medical school.

For the purposes of this motion, there is no dispute that Falcone received these accommodations. Nonetheless, he had serious difficulties on the first set of examinations, and was contacted by the Associate Dean regarding his poor performance. Falcone appeared before COSS on November 15, 1995. He requested additional accommodations, and requested permission to reschedule his second set of exams. That accommodation was granted. The Committee allowed Falcone to remain in medical school, but recommended that he decelerate to half-time status. At that time, the Committee also noted that Falcone needed to be able to successfully complete 80% of the courses in which he was enrolled to prevent further action by COSS, including possible dismissal. Falcone agreed to half-time status.

Despite the half-time status, and the grant of all requested accommodations, Falcone failed to successfully complete at least 80% of his attempted credits. Falcone again appeared before COSS.[4] And again, he was permitted to continue in medical school.

As a result of this second appearance before COSS, Falcone received additional requested accommodations, as confirmed by the office of Disability Services. In all, his accommodations included double time and a private room for exams; a microscope and slides for home use; notes from a student co-op; and regular meetings with a mentor. Falcone eventually completed his "second year" of medical school.

IV. Clinical Education

A. Initial Accommodations

As he began his clinical rotations, Falcone did not request specific accommodations. However, he claims that he did approach an associate dean, and suggested that the University send a letter informing his clinical supervisors of his disability and his request for extra time. Falcone claims that the associate dean shook her head, and said "No, I don't know." The subject was then dropped. Falcone does not claim that he pursued the subject of accommodations with individual clinical faculty as he began his rotations, or with the disability counselor to whom he was assigned. He testified (at a COSS hearing) that he was unsure what accommodations he should request, and he did not want to share information about his disability with clinical faculty, because grading

4. This hearing was held on August 14, 1996.

is so subjective. It is unclear whether his original accommodations (extra time for tests, flexible deadlines, and tutors) still applied.

B. Pediatric Neurology

Falcone failed his Pediatric Neurology rotation in the Fall Quarter of 1998. Falcone had not requested any accommodations from his course supervisor, or from the Disability Services Center.

Receipt of a failing grade in any clinical rotation mandates an appearance in front of COSS. Falcone appeared in front of COSS on February 17, 1999, to address the failure in pediatric neurology. Falcone had several explanations for his failure, including the fact that the course was an elective, he was petrified of the babies because they were so fragile, he was intimidated by the faculty, and he felt unprepared for the rotation.

After the hearing, the office of Disability Services sent letters to Falcone's then-current instructors, requesting accommodations in testing, scheduling, and providing extra feedback.[5] COSS eventually informed Falcone that he would be allowed to remain enrolled in the medical school, and that the accommodations as requested in the disability services letter would not compromise the essential elements or objectives of the rotation.

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5. Among other things, the letter specifically requested that Falcone have "access to at least weekly, regularly scheduled feedback meetings with yourself or your designate."

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C. Clinical Medicine IV

The next notable difficulty was in Summer of 1999, when Falcone failed his Clinical Medicine IV rotation. His instructors noted major concerns with his ability to organize and synthesize information, and his tendency to digress when discussing patients.

Again, COSS held a hearing.[6] At the hearing, the course director noted that he had not received requests for accommodation until several weeks into the rotation. Falcone testified that he did not mention his entitlement to accommodations until the rotation was nearly complete. He also never informed Disability Services that he was not receiving the requested accommodations.

COSS again determined that Falcone could remain enrolled, and allowed him to retake Clinical Medicine IV because he had not been provided with the requested accommodations. COSS reminded Falcone that "[y]our engagement in this process is necessary to ensure both the effective provision of accommodations and a self-awareness of limitations essential for any physician to treat patients safely." The Committee noted that this was the same message they attempted to convey previously, both at the December 15 dismissal hearing as well as via correspondence.

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6. This hearing was held on November 17, 1999.

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D. Emergency Medicine

In the fall of 1999, Falcone failed emergency medicine. His COSS dismissal hearing was held on March 15, 2000. At the hearing, Falcone complained that he did not receive requested accommodations during his rotation. He specifically identified a failure to provide adequate feedback as a rationale for his failure in the rotation.

Supervising physicians and residents in the emergency medicine rotation evaluate students on a daily basis by use of feedback cards. The cards are completed by the supervisor at the end of each shift. On the card is a section entitled "feedback provided." In addition, students are told that they can request more or more specific feedback from the supervisor on a particular shift. Falcone does not dispute that he received those daily evaluations. His complaint is that he did not receive adequate feedback because he was not provided with additional, *formal* evaluations. He points out that he received nothing more than what is provided to all medical students in the emergency medicine rotation.

This time, COSS determined that Falcone could not continue in the medical school. COSS based its decision on two factors: (1) Falcone received appropriate accommodations on the emergency medicine rotation, but nevertheless failed the course, and (2) Falcone was unable to demonstrate, with or without accommodation, that he could synthesize data in a clinical setting to perform clinical reasoning, an essential element of functioning as a medical student and physician.

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E. Additional Clinical Courses

Falcone was allowed to continue in his courses while COSS's decision and his appeal were pending. During this time, he learned that he had failed Advanced Medicine. He passed Neurology, but the course director noted that Falcone had serious problems during the rotation. For the final exam for Neurology rotation, instead of writing an answer, Falcone wrote, "This exam represents the most boring selection of material I have ever seen."[7] Finally, the instructor for Renal Medicine noted that had a grade been issued, Falcone would have failed the course because he lacked fundamental abilities in clinical medicine including an inability to collect, distill, organize, and convey key clinical information.

F. Medical School / COSS Actions

As noted, COSS dismissed Falcone from medical school following his failure of emergency medicine. Falcone appealed the decision, and it was upheld. The medical school determined that Falcone was unable to adequately synthesize data in a clinical setting, and this inability would compromise patient safety.

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7. The Course Director noted that such a response would have earned a failing grade for a typical student, but that he chose not to fail Falcone because of Falcone's disability. It is not clear how Falcone's response on this examination is related to his disability.

Appendix B

ANALYSIS

I. Rehabilitation Act

Falcone brings this action pursuant to section 504 of the Rehabilitation Act, which provides that

> No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

To establish a prima facie case of discrimination based on disability in violation of the Act, Falcone must produce evidence that (1) he is disabled as the Act defines that term; (2) he is qualified to remain a student at the medical school ("otherwise qualified"); (3) he was dismissed solely because of his disability; and (4) the school receives federal financial assistance.

For the purposes of this motion, the University concedes that Falcone has established the first and final elements. Therefore, the parties focus on the second and third elements. Specifically, defendant claims that Falcone is not "otherwise qualified" with or without accommodations, and that he was not dismissed solely because of his disability. Falcone argues that he did not receive appropriate accommodations, therefore the faculty cannot say that he would not be able to meet the minimum requirements, if given adequate opportunity.

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Courts regularly apply the academic deference rule to challenges arising under the Americans with Disabilities Act ("ADA") and Rehabilitation Act.[8] *See Amir v. St. Louis Univ.*, 184 F.3d 1017, 1028 (8th Cir. 1999) (ADA case); *Wong v. Regents of Univ. of California*, 192 F.3d 807, 817 (9th Cir. 1999); *Wynne v. Tufts Univ. School of Medicine*, 976 F.2d 791, 792 (1st Cir. 1992). *See also Anderson v. University of Wisconsin*, 841 F.2d 737 (7th Cir. 1988) ("The Supreme Court has repeatedly admonished courts to respect the academic judgment of university faculties.") (citing *University of Michigan v. Ewing*, 474 U.S. 214 (1985); *University of Missouri v. Horowitz*, 435 U.S. 78 (1978)). In traditional cases involving academic dismissal and the academic deference rule, summary judgment is appropriate unless there is evidence from which a jury could conclude that there was no rational basis for the decision to dismiss, or that the decision was motivated by bad faith or ill will unrelated to academic performance. *Ikpeazu v. University of Neb.*, 775 F.2d 250, 253 (8th Cir. 1985) ("An actionable deprivation in an academic dismissal case is proved only if there was no rational basis for the university's decision, or if the decision was motivated by bad faith or ill will unrelated to academic performance.").

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8. The Eighth Circuit has held that cases interpreting the ADA and the Rehabilitation Act are interchangeable. *See, e.g., Allison v. Department of Corrections*, 94 F.3d 494, 497 (8th Cir. 1996) ("Because the same basic standards and definitions are used under [the ADA and the Rehabilitation Act], cases interpreting either are applicable and interchangeable for purposes of our discussion.") (citations omitted).

Appendix B

A. Otherwise Qualified

"The Supreme Court has interpreted 'otherwise qualified handicapped individual' as 'one who is able to meet all of a program's requirements in spite of his handicap.'" *Beuford v. Father Flanagan's Boys' Home*, 831 F.2d 768, 771 (8th Cir. 1987) (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)). If a person can meet the requirements of a program with accommodations, that person is "otherwise qualified." *Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F.3d 432, 435 (6th Cir. 1998). Falcone has the burden to establish that he is "otherwise qualified." *Stern v. University of Osteopathic Medicine and Health Sciences*, 220 F.3d 906, 909 (8th Cir. 2000).

1. Requested Accommodations

Since it is clear that Falcone cannot meet the requirements of the program without accommodations, the Court must determine whether any "reasonable" accommodation, that Falcone requested, would have enabled Falcone to meet those requirements. *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 (1987). *See also Ballard v. Rubin*, 284 F.3d 957, 961-62 (8th Cir. 2002) (discussing necessity of express request for accommodation in the typical case) (citing and distinguishing *Bultemeyer v. Fort Wayne Community Schs*, 100 F.3d 1281, 1285 (7th Cir. 1996) (reasoning that where plaintiff employee has mental disabilities and the employer knows the employee needs an accommodation, but does not know how to ask for it, the

employer "should do what it can to help")); *Walsted v. Woodbury County*, 113 F. Supp. 2d 1318, 1322 (N.D. Iowa 2000) (reasoning that where it is "common knowledge" that an employee has significant learning disability and cannot read or write, it should be obvious to the employer that employee needs an accommodation, and the employee is not required to expressly request it)).

In this case, Falcone initially requested specific accommodations through the office of Disability Services. However, he did not meet again with Disability Services as he began his clinical training.[9] He has admitted that he did not ask for specific accommodations at that point, because he did not know what to ask for, and because he did not want to self-identify as an individual with a disability. These might be legitimate concerns, but they do not relieve Falcone of his burden to request specific accommodations, or his responsibility to work with the University to ensure that reasonable accommodations were provided. Falcone has the responsibility to put the school on notice that a particular accommodation is needed, and to make a "sufficiently direct and specific request" for a particular accommodation. *Rossomando v. Board of Regents of the Univ. of Neb.*, 2 F. Supp. 2d 1223, 1230 (D. Neb. 1998) (internal quotations omitted).

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9. Falcone remembers a conversation with an associate dean, described above, in which the dean allegedly shook her head when Falcone mentioned sending a letter to his clinical faculty. This casual conversation does not amount to a specific request for accommodation.

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By the time Falcone took the emergency medicine rotation, however, he had requested specific accommodations. Included in the accommodations request was a specific request for "access to at least weekly, regularly scheduled feedback meetings with yourself or your designate." As noted above, Falcone received daily feedback from the various physicians and residents with whom he worked in the emergency medicine rotation, but he did not have a scheduled, formal feedback session with either of the course directors (Drs. Kumasaka and Kilgore).

About two weeks into the emergency medicine rotation, Falcone met with his advisor, Dr. Marilyn Becker. When Dr. Becker inquired into his accommodations, Falcone told her he was not receiving weekly scheduled feedback. This information was apparently conveyed to Dr. Kilgore, who, according to Falcone, took issue with this characterization. Kilgore and Falcone had a confrontation regarding the feedback, or lack thereof. However, the rotation was nearly finished, and Falcone apparently did not receive any additional feedback.

The University's argues that Falcone was provided with his requested accommodation. In fact, the University continues, he was provided with access to more than the "weekly, regularly scheduled feedback meetings" because he received feedback on a daily basis. The University also notes that Falcone did not request that such meetings be automatically established by faculty. Instead, he requested *access* to such meetings, which was provided. Falcone disputes the University's characterization. He argues that the available daily feedback simply cannot be an "accommodation" because it is provided to every student. Falcone also faults his instructors for not taking the responsibility or initiative in setting up those weekly feedback meetings.

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The Court accepts neither argument in its entirety. While it is true that disabled students have a responsibility to identify and request specific accommodations, once the student does so, the institution has responsibilities as well. *See Bultemeyer v. Fort Wayne Comm. School*, 100 F.3d 1281, 1285 (7th Cir. 1996) (discussing responsibility of both parties to participate in good faith to determine accommodations). Viewing the evidence in the light most favorable to Falcone, it is relatively clear that he was requesting assistance beyond the cursory feedback provided at the end of each emergency medicine shift. Such feedback was not provided. While the Court is not convinced that an "accommodation" must always be something more than what other students are provided, it is fairly clear that Falcone needed, and in fact, requested, more feedback. Viewing the evidence in the light most favorable to Falcone, the Court finds that the University failed to provide this particular accommodation.[10]

Despite this failure to provide feedback, the Court finds no evidence that the University acted in "bad faith." The University provided Falcone with significant and extensive accommodations, even allowing him to repeat several classes (which is against medical school policy). Given these accommodations, and Falcone's poor record, it is difficult to credit any contention that the University acted in bad faith.

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10. The University makes no attempt to argue that more extensive feedback, such as a weekly meeting with one of he two course directors, would not be "reasonable." Such an argument likely would be unavailing given the fact that the University agreed to the accommodations and agreed that the requested accommodation of "scheduled feedback" would not interfere with the essential elements of Falcone's medical school education.

2. Academic Standards

It is not enough for Falcone to establish that a particular request was requested and was not provided-the University is entitled to summary judgment if the University can show that Falcone is not qualified (because even with the accommodation, he could not meet the institution's academic standards). *See Stern*, 220 F.3d at 909 (reasoning that even if University was required to engage in interactive process to find accommodations, plaintiff "nonetheless would have to establish that reasonable accommodations for his disability would render him qualified for the medical school program") (citing 29 U.S.C. § 794(a)); *Wong*, 192 F.3d at 817 (citing *Zukle v. Regents of the Univ. of California*, 166 F.3d 1041, 1045 (9th Cir. 1999)).

The University argues that Falcone's consistent inability to pass courses, both clinical and classroom, demonstrates that he is not "otherwise qualified." Specifically, the medical school found that Falcone lacks the ability to synthesize data as is required in a clinical setting. The Court finds that this characterization is reasonable, given Falcone's entire record in the medical school.[11]

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11. Falcone urges the Court to look only at his performance in emergency medicine. However, COSS's decision was based not just on his failure in that rotation, but on his entire record. Nothing in the Rehabilitation Act restricts the Court's ability to review Falcone's entire record, especially when it is clear that the University appropriately relied on his entire record when considering whether he was qualified to remain in medical school.

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The University points out that despite all requested accommodations, Falcone failed Advanced Medicine, and would have failed Renal Consult, had a grade been issued. In Renal Consult, Falcone did not complain that he was not receiving requested accommodations, in fact, he noted that his instructor "sat down and gave me really useful feedback." Despite this feedback, Falcone did not do well in the course.

In addition, in the classes that Falcone eventually passed, the evaluations he received do not inspire confidence. Falcone's instructors consistently expressed doubt about his ability to work with patients. For example, his psychiatry instructor noted that Falcone's "main area of difficulty is his interpersonal style with patients and colleagues which tends to be not sensitive to the situation and comes across as judgmental." His evaluation from his surgery rotation similarly noted that "all faculty and residents [who] worked with Christopher [Falcone] expressed concern with his ineptitude to relate to patients. The residents and doctors [who] work with Christopher Falcone observed a definite difficulty and inefficient communication with patients."[12]

Many faculty members expressed concern about Falcone's ability to organize and synthesize data. For example, his otolaryngology evaluation noted that "His ability to synthesize the information at hand into a practical, workable plan was lacking." In his Medical Externship, the

12. Falcone's inability to interact appropriately with patients evidently does not stem from a disinterest in their care. Indeed, one instructor noted that Falcone "ha[s] a . . . deep, natural caring for his patients." Another noted that "Chris [Falcone] is a student who put forth genuine effort in care for his patients . . ."

instructor noted that Falcone "often had difficulty with efficiency, and also with organization and succinct presentation of his write-ups ... He needs to ... avoid becoming too entwined in extraneous information." Yet another instructor noted that "His oral presentations were scattered, with too much extraneous details and a lack of focus on major issues." Though this instructor acknowledged that the presentations improved somewhat after feedback, the instructor remained "concerned about [Falcone's] ability to see the big picture and remain focused."

Perhaps more distressing is the concern of Falcone's advisors and mentors that Falcone lacks the self-awareness to realize how his disability impacts his abilities, and ultimately would affect his patients. Finally, it is impossible to ignore the exceptionally poor judgment Falcone revealed when he refused to write his final exam in Neuroloy.

Though the Court rejects the University's argument that all accommodations were provided to Falcone on the emergency medicine rotation, the Court finds that the University had ample rationale for its determination that Falcone is not "otherwise qualified." It is notable that as Falcone appealed COSS's decision to dismiss him, he argued not that he would eventually be able to perform adequately as a physician, but that he had a "bright future" in "basic research." However, as the University points out, his M.D. would allow him access to all aspects of medical practice. The University cannot restrict his M.D. once it is awarded. The Court is not convinced that the accommodation would have enabled him to successfully complete all the program requirements. Therefore, the University is entitled to summary judgment. *Stern*, 220 F.3d at 909.

Appendix B

B. Reasons for Dismissal

Falcone argues that his progress in medical school was impeded by the failure to provide accommodations in his clinical rotations, and that therefore his dismissal was based on his disability. The question is not whether Falcone might convince this Court, or a jury, that he might eventually be able to pass his clinical course. *Anderson*, 841 F.2d at 741. It is whether the University discriminated against him because of his disability- that is, did the University dismiss him even though it would have graduated a student whose academic performance was as poor but whose difficulties did not stem from a disability. *Id.* "Just as Title VII of the Civil Rights Act of 1964 ensures only equal treatment and not 'correct' decisions, so the Rehabilitation Act requires only a stereotype-free assessment of the person's abilities and prospects rather than a correct decision." *Id.* (citation omitted). Because the Court finds that the University dismissed Falcone due to his inability to synthesize information, as evidenced by his medical school record in its entirety, no rational fact-finder could find that Falcone was dismissed solely because of his disability, and the University is entitled to summary judgment.

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ORDER

Based upon the foregoing, the submissions of the parties, the arguments of counsel and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendants' motion for summary judgment [Docket No. 31] is **GRANTED**.

2. Plaintiff's amended complaint [Docket No. 26] is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: September 3, 2003
at Minneapolis, Minnesota.

s/ John R. Tunheim
JOHN R. TUNHEIM
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED DECEMBER 20, 2004

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3469

Christopher L. Falcone,

Appellant,

vs.

University of Minnesota and the Board of Regents,

Appellee.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Murphy took no part in the consideration or decision of this matter.

(5128-010199)

December 20, 2004

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D — RELEVANT STATUTE

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

> **(1)(A)** a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall

be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

APPENDIX E — SUMMARY OF FALCONE'S YEAR IV CLINICAL ROTATIONS[1]

Course	Status	Circumstances
Cycle 1.1) *Clinical Medicine IV, Summer 1999*	Alleged-Failure **without** accommodations[1] (App 78, last paragraph)	University admits Falcone was not accommodated and *alleges* that the course director was not aware of the accommodation letter until the last week of the 8 week rotation. (App.56, Kane specifies dates, App. 32, 34 confirm duration)
Cycle 1.2) *Medicine II, Fall 1999*	Alleged-Failure **without** accommodations (App. 115, Kane and Mauer also App 21 & 22)	Lack of weekly feedback sessions undisputed by the medical school. *Allegedly* the grade was unknown for 22 weeks. No hearing held to determine whether Falcone had been accommodated. (App. 32, 34, confirm start & duration, App. 42 failure notification)

1. All Appendix cites refer to the Joint Appendix filed with Appellant's Brief dated November 24, 2003.

Cycle 1.3) *Pediatrics, Fall 1999*	*Status of course does not appear in appendix but App. 22 states no accommodations provided*	Falcone alleges that university disputes Falcone's claim that he was not accommodated in this rotation. (App. 22, evaluation does not appear in Joint Appendix, University has never alleged that Falcone failed this rotation)
Cycle 2.1) *Adult Neurology, Fall 1999*	Allegedly-Failed **without** accommodations (App. 23)	District court ruled that Falcone's grade should not be changed from a *passing* to a failing grade and reported that Falcone stated that the exam was "the most boring one that he had ever taken." Falcone's view of the exam remains *undisputed* (App. 567). Director alleges accommodation. (App. 167, 168).
Cycle 2.2) *Emergency Medicine Winter 1999*	Allegedly-Failed **without** accommodations (App. 313).	The District Court ruled that Falcone clearly was not accommodated on the rotation. (App. 573). The Eighth Circuit Court stated accommodations were only imperfect. (See 8th Circuit Court Opinion at pp. 6-7).

Cycle 2.3) *Neurosurgery* *Winter 1999*	*Passed* **without** accommodations (App. 28, 29, & App. 99, last paragraph, 6th line)	University does not dispute Falcone's claim of non-accommodation nor do they dispute his passing of the rotation. (App. 43, 44).
Cycle 3.1) *Renal Consult/* *Nephrology Spring 2000*	Allegedly-Failed **without** accommodations; however, Dr. Hostetter refused to tender a grade. (App. 32, 34, 324)	Two days after the March 15th, dismissal hearing regarding alleged failure in Emergency Medicine, Falcone was informed by Hostetter that no grade would be tendered. Respondent claims Petitioner was accommodated based on Falcone's ***expansive*** *"the awesome feedback Dr. Siegal, its too bad we didn't meet twice"* [in regards to the standard mid-evaluation given by Dr. Segal at the end of the second week of the rotation—13 days prior to the March 15th COSSS hearing]. (App. 32, 34; App. 100–first paragraph, 4th line.). Falcone never mentions being given subsequent weekly conferences by either Dr. Segal or Dr. Hostetter.

Cycle 3.2) *Retake Spring 2000* *(Cycle3 cont. Item2. cont.)*	Allegedly-Failed with accommodation (COSSS *never actually accused Falcone of failing* the rotation but they clearly did not consider it a turn around. (App.151, 152)	Falcone received 4 consecutive increasingly higher passing weekly scores from Dr. White the last of which, the submitted evaluation for the first 4-week, Internal Medicine segment, was arguably outstanding. (App. 164,165). This was followed by a single "Failing" week 1 score from Dr. LaFond in the subsequent 4 week Family Practice segment. That evaluation was intended to be exclusively for Falcone's benefit toward improvement. Three course days after its creation, Falcone made his final appearance before the COSSS on Wednesday, April 26, 2000. Falcone only reported his perception of LaFond's first feedback session of specified duration and content, relative to self-evaluation. Note evaluation was not listed in Falcone's appeal. (App.123, 326).

Cycle 3.3) *3d course in cycle 3 was disallowed*	Termination from Medical School prevented Falcone from completing the third cycle.	Falcone was not allowed to re-take his Emergency Medicine rotation and was personally presented with the COSSS communication on Friday April 28, 2000 and ordered to cease rotating w/ LaFond. (App. 325)

1. "Without accommodation" as used throughout this summary means primarily there were no weekly conferences in the course.